United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 18,937

920

CHARLES E. TATUM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of United States District Court

for the District of Columbia

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QUESTIONS PRESENTED

1. In a prosecution for robbery, can the trial judge instruct the jury that an inference of guilt may be drawn from the recent unexplained possession of stolen property, when the stolen property is fungible -- e.g., money in small denominations -- and there is no evidence identifying the property in appellant's possession as the stolen property?

2. In a prosecution for robbery, is the failure to instruct a new jury about the elements of the crime charged, and the failure to instruct on the duty to acquit if the government fails to prove identity beyond a reasonable doubt, error requiring a new trial?

3. In a trial for robbery, is the admission into evidence of the opinion and conclusion of a witness that the appellant saw the witness and then ran away, error requiring reversal, when no factual foundation for the opinion has been laid and the facts are easily describable?

4. In a trial for robbery, is it error requiring reversal to allow, over objection, a series of questions by the prosecutor designed to show that a crucial defense witness was incarcerated at the time of the trial, when the witness had not been convicted of any offense at that time?

TABLE OF CASES

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STATUTES AND RULES

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* Cases marked with an asterisk are those principally relied upon.

(The Table of Cases does not include all of the 64 cases cited in the Appendix to this brief.)

STATEMENT OF POINTS

I. THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS IN INSTRUCTING THE JURY THAT THEY COULD INFER GUILT SOLELY FROM THE FACT THAT APPELLANT HAD THREE DOLLARS AND NINETY-TWO CENTS IN HIS POSSESSION WHEN HE WAS APPREHENDED.

(With respect to point I, appellant desires the Court to read the following pages of the Reporter's Transcript: 184-186).

II. THE CHARGE TO THE JURY WAS DEFICIENT ON THE ISSUES OF IDENTIFICATION, AND ON THE DUTY TO ACQUIT IF THE GOVERNMENT FAILED TO PROVE EACH ELEMENT OF THE CRIME CHARGED. THESE DEFICIENCIES ARE PLAIN ERRORS AFFECTING SUBSTANTIAL RIGHTS.

(With respect to point II, appellant desires the court to read the following pages of the Reporter's Transcript: 178-187 inclusive).

III. THE ADMISSION INTO EVIDENCE OF IMPROPER OPINION AND CONCLUSION EVIDENCE REQUIRES REVERSAL OF APPELLANT'S CONVICTION.

(In connection with point III, the appellant desires the court to read the following pages of the Reporter's Transcript: 41-42, 171).

IV. THE TRIAL COURT COMMITTED SUBSTANTIAL ERROR WHEN THE PROSECUTOR WAS ALLOWED TO BRING OUT, IN CROSS-EXAMINATION OF WITNESS ANDERSON, THAT ANDERSON WAS IN JAIL AT THE TIME OF THE TRIAL, ALBEIT HE WAS NOT CONVICTED OF ANY CRIME AT THAT TIME.

(with respect to point IV, the appellant requests the court to read the following pages of the Reporter's Transcript: 92-95, 172, 173-175).

SUMMARY OF ARGUMENT

The trial judge committed plain error affecting substantial rights when he instructed the jury that the inference of guilt arising from the recent unexplained possession of stolen property might be applicable in this case. The inference can only be applied to cases in which the property found in the accused's possession is identifiable as the stolen property. In the instant case the property was money in small denominations, whose fungible nature prohibits drawing the inference charged.

The trial judge committed further plain error in his charge by failing to instruct the jury about the elements of the crime charged; by failing to instruct on the duty to acquit if not persuaded beyond a reasonable doubt of the accuracy of the identification evidence; by failing to instruct on the duty to acquit if the defendant's alibi created a reasonable doubt; and by characterizing the government's evidence as "the proof".

The trial court allowed, over objection, certain opinion and conclusion testimony. The admission of this testimony improperly removed from the jury's consideration the issue of whether the appellant saw the eye-witness and then turned and ran away from him. The prejudice was multiplied when the prosecutor argued that this evidence was proof of appellant's guilt.

The trial court erred in permitting the prosecutor, over objection, to bring out that the only defense witness other than the accused was in jail at the time of the trial, even though he had not been convicted of any crime at that time. The rule in the District of Columbia does not permit such evidence.

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 18,937

CHARLES E. TATUM,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was tried in the United States District Court for the District of Columbia, before the Honorable Henry A. Schweinhaut, United States District Judge, and a jury, on an indictment under D.C. Code, Section 22-2901, charging one count of robbery. On March 9, 1964, the jury found appellant guilty as indicted; and on September 18, 1964, after an observation ordered by the Court, 18 U.S.C. Sec. 5010 (e), appellant was sentenced pursuant to The Federal

Youth Corrections Act, 18 U.S.C. Sec. 5010 (b). The judgment and commitment was filed on September 21, 1964. On the same day, appellant was granted leave to appeal in forma pauperis. The jurisdiction of this court is founded on 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This is an appeal from a judgment of guilty after trial on an indictment for robbery. The government's witnesses testified substantially as follows:

The complaining witness, a Miss Bechter, was standing at a bus stop at Eighth Street and Pennsylvania Avenue, N.W. at about 5:00 o'clock on January 14, 1964.(Tr. 26-27). She had in her possession a pocketbook, in which was a change purse containing approximately $3.85.(Tr. 28-29).

Also standing at the bus stop was one Talbert. Talbert testified that he saw the appellant reach down into Miss Bechter's pocketbook and take out her purse but he did not do anything to apprehend the thief at that time. (Tr.38).

Both Talbert and Miss Bechter boarded the bus, and when the bus had left the bus stop, Talbert told Miss Bechter that "her purse had been picked." (Tr. 39). Talbert and Miss Bechter got off the bus at either Ninth Street (Tr.32) or Tenth Street (Tr. 47-48) and together they walked back toward the bus stop. (Tr.32,40). When they arrived at Eighth Street, Talbert saw the appellant standing inside the doorway of Kann's Department Store. (Tr.40). Talbert entered the store and lost sight of appellant.(Tr.55). He again saw appellant "approaching the exit on Seventh Street."

(Tr. 42). Appellant was walking. (Tr.55). Talbert "grabbed him and held him." (Tr.42). Talbert had never seen the appellant prior to this incident. (Tr. 43).

The store detective, Mr. MacLuskie, a licensed special policeman, was called to the counter where Talbert had seized appellant, and was told by Talbert that appellant "had just robbed a lady." (Tr.70). The appellant immediately denied this. (Id.) MacLuskie took appellant and Talbert to the Eighth Street side of the store where Miss Bechter was waiting. Miss Bechter told MacLuskie that the appellant had taken her purse.* (Tr.71). MacLuskie searched appellant and found three dollars and ninety-two cents in appellant's pocket. (Tr.72). This money was received into evidence over objection. (Tr.81). Neither the change purse nor any of Miss Bechter's personal papers were found in appellant's possession. (Tr.75). In fact, the change purse and a driver's license were found the next morning in some hedges at Pennsylvania Avenue and Market Streets, N.W. (Tr. 77-78).

The appellant's defense testimony was substantially as follows:

One Cornelius Anderson testified that he had met appellant in the afternoon of January 14, sometime after 3:00 o'clock, and they decided to go shopping at Hecht's Department Store. (Tr.84). Together, after finishing at Hecht's they went to Kann's, arriving between 4:30 and 5:00 o'clock, where they went to the food counter. (Tr. 84-86).

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* Miss Bechter, of course, had no way of knowing who took her purse; she was not even aware that it was missing until Talbert had so informed her on the bus.

While Anderson stayed at the food counter, eating, appellant left him to purchase a sweater. Anderson did not see him again because appellant was arrested. (Tr. 85-86). Anderson further testified that appellant had at least twenty-two dollars in his possession when they left Hecht's. (Tr. 86,90-91).

During cross-examination of Anderson, and over objection, the prosecuting attorney was permitted to bring out that Anderson was in jail at the time of appellant's trial (Tr. 95-96), albeit at the time Anderson had not been convicted of any offense. The prosecutor during his summation again alluded to Anderson being in jail. (Tr. 172). Defense counsel was willing to stipulate that the witness and the appellant had an opportunity to talk about the case before the trial. (Tr. 93-94).

The appellant took the stand and testified to his activities on that day, telling the same story that Anderson had told. He denied any participation in the theft. (Tr. 108-109).

The rebuttal witnesses added nothing concerning the theft itself or the identification of the appellant.

The judge's charge to the jury is quoted and discussed in several arguments made on appellant's behalf.

(With respect to point I, Appellant desires the Court to read the following pages of the Reporter's Transcript: 184-186)

I. THE TRIAL COURT COMMITTED PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS IN INSTRUCTING THE JURY THAT THEY COULD INFER GUILT SOLELY FROM THE FACT THAT APPELLANT HAD THREE DOLLARS AND NINETY -TWO CENTS IN HIS POSSESSION WHEN HE WAS ARRESTED.

a) An instruction on the inference of guilt arising from the recent unexplained possession of stolen property is not proper when the property seized from a defendant is fungible and has not been identified as the stolen property.

The government proved in its main case that the purse stolen from the complaining witness contained three dollars and eighty-five cents. They also proved that when appellant was apprehended he had in his possession three dollars and ninety-two cents. There was no evidence offered identifying the money in appellant's possession as the money stolen from the complainant, nor was any evidence offered that when apprehended appellant had the complainant's purse or papers.* Based upon these facts, the trial court instructed the jury:

> There is a rule of law, a principle of law, which you may or may not decide applies to this case. That is that the possession of stolen property recently after the property was stolen justifies the inference that the possession is guilty possession, and though only prima facie evidence of guilt -- that is, evidence on its face, -- may be of controlling weight unless explained by the circumstances or satisfactorily accounted for in some way consistent with innocence.
>
> I should say more about that than just to recite the rule of law: The money in this case was substantially equal in amount to the money alleged to have been stolen, but it was not identified of course by serial numbers, say, as the precise bills or the precise change actually. There was five or seven cents more

* The purse was found the next day across the street from the store in which appellant was arrested. (Tr. 77-78).

in change than Miss Bechter said was actually stolen from her, but, the approximate amount of money, of currency, was found on the defendant.

You may draw an inference that his possession was guilty possession, or you may decide not to, depending on how you view the evidence.

He and his witness explained it by saying that he had a twenty-dollar bill which the witness Anderson said that he saw under a one-dollar bill while they were in Hecht's store, that he saw the twenty-dollar bill and that he, Anderson, had given him two more dollars in change. He owed him two dollars. But he said that he paid him that earlier in the afternoon while they were in Hecht's. The defendant testified to that also, that he had -- I think he said three dollars in one-dollar bills and some change plus the twenty-dollar bill. And he says that when the witness Talbert grabbed him in Kann's store and, as he said, caused him to 'black out' he felt Talbert's hand go in his pocket, and that twenty dollars of the twenty-three dollars was gone when the security officer arrested him.

So he accounts for the possession of this money. And you will accept his explanation or you won't. If it creates a reasonable doubt in your mind, that is the end of the matter and you should find him not guilty. If you don't believe his story or do not have a reasonable doubt, you may consider the inference that I have told you about and find that it was guilty possession. You take that circumstance into account, along with all the rest of the evidence that there is, so that your verdict will be upon the whole case and not a part of it.

The necessary prerequisite to the inference of guilt which arises from the unexplained possession of stolen property recently after a theft has been committed, is, of course, that the property be identifiable and be identified as the recently stolen property. Without specific identification the inference cannot, as was charged here, support a verdict of guilt. Appellant does not urge here that the jury cannot consider the fact the appellant had in his possession an amount of money similar to the amount stolen from the complainant, but it is submitted that this fact, standing alone, cannot support a verdict of guilty.

In the leading case of Tot v. United States, 319 U.S. 463 (1943), an attack under the due process clause was successfully mounted on a statute which made the fact of possession of a firearm, by a person who hitherto had been convicted of a crime of violence, presumptive evidence that the firearm was shipped or received in interstate commerce. The Supreme Court stated the constitutional test:

> a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. Id. at 467-68.

Speaking specifically to the inference involved in the instant case -- viz., the inference of guilt from possession of stolen property -- Judge Brown stated that it is a

> fundamental concept that a Federal Trial Judge at all times, in all stages of the trial, must make certain that a naked legal rule has factual relevance, and its application is surrounded with continuous safeguards. Whether the presumption* can arise, whether it is permissible requires a determination that the total circumstances give rational assurance to the feeling that in the abundant experience of mankind, the conclusion sought to be applied has the intrinsic mark of probability and reasonably convincing weight. Barfield v. United States, 229 F.2d

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* In this circuit the word "inference" would have been proper.

936, 942 (5th Cir. 1956). And in Wright v. United States, 89 U.S. App. D.C. 70, 189 F.2d 699 (1951), this Court said that the inference arising from the recent and unexplained possession of stolen property is an inference of "limited character."

The inference of guilt from possession is generally applied in cases involving five types of stolen property: (1) cars and trucks; (2) securities, bonds, checks and other identifiable commercial instruments; (3) money stolen from banks and specifically identified by serial number; (4) commodities hijacked from interstate shipments; and (5) miscellaneous specifically identifiable stolen property, such as jewelry, cameras with serial numbers, wallets, furs, etc. The Appendix to this brief cites over sixty cases grouped by subject matter in which the inference was involved, and in every case the property found in the defendant's possession was clearly identifiable as the recently stolen property. No case has been found to the contrary.

Usually, when the inference of guilt from possession is involved in a case, the identification of the property is so obvious that the point is not discussed. When discussion does occur, the unanimous rule is that the property must be specifically identified as the stolen property. See e.g., Thomas v. United States, 11 F.2d 27 (4th Cir. 1926); Nakutin v. United States, 8 F.2d 491 (7th Cir. 1925); Murphy v. United States, 133 F.2d 622 (6th Cir. 1943);

Husten v. United States, 95 F.2d 168 (8th Cir. 1938); Torres v. United States, 270 F.2d 252 (9th Cir.), cert. denied, 362 U.S. 921 (1959).

Applying the rule of identification, there are four "all fours" cases discussing the permissibility of drawing the inference from the possession of money. One of them is Karn v. United States, 158 F.2d 568 (9th Cir. 1946), in which the court reviewed a conviction for the theft of $1,079 from a bar. At trial appellant was confronted with the fact that when arrested he had $377 in his possession. One of the bills in appellant's possession was soiled, and the government's witness gave "vague and unsatisfactory" testimony that a similarly soiled bill was in the cash register of the bar. It is submitted that what the court said is dispositive of the instant case:

> It is true that actual possession of stolen property may be shown, but it is equally true that the prosecution must also prove, beyond a reasonable doubt, that the property found in possession of the accused is, in truth and in fact, the identical property which was stolen. A bare assertion that property in the hands of accused is 'similar property' or property that 'looks like it' is not sufficient to establish such property as the stolen property. (Emphasis added).

Crawley v. United States, 268 F.2d 808 (4th Cir. 1959), reviewed a prosecution for bank robbery. The court examined the permissibility of drawing an inference of guilt from the mere fact of possession of some of the stolen money after the robbery. The rule stated is:

> There is no question but that mere proof of possession of one or a number of new bills identified with the shipment from a Federal Reserve Bank on June 28 would not support an inference of wrongdoing.*

A fortiori, if proof that a defendant had in his possession some money specifically identifiable by serial number, recently after the commission of a robbery involving that money, is not sufficient to "support an inference of wrongdoing," then proof that appellant had in his possession unidentifiable money, in a small amount, is not sufficient to support an inference of wrongdoing, and the court should not have so charged.

Also directly in point are two Fifth Circuit cases, Self v. United States, 249 F.2d 32 (1957) and Gill v. United States, 285 F.2d 711 (1961). In both these cases defendants were charged with robbery and the prosecution introduced evidence that the defendants had in their possession large sums of money, some of which was identified by serial number. In both cases the court held:

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* The conviction was sustained because it was shown that: (1) Crawley possessed a large number of such bills many of them in consecutively numbered sequences; (2) he had no new currency which was not identified with the shipment from a Federal Reserve Bank on June 28; and (3) the money in Crawley's possession was bound in wrappers having identifiable initials on them, and the wrappers were proven to have been in the Federal Reserve Bank on the evening preceding the robbery.

> Proof of the unexplained possession of unusual amounts of money after a robbery, standing alone, is not competent evidence to connect a possessor with the robbery; but it becomes competent provided it is further shown that he was impecunious prior thereto.

Cf. Petro v. United States, 210 F.2d 49 (6th Cir.), cert. denied sub. nom., Sanzo v. United States, 347 U.S. 974 (1954). In the instant case the amount of money in appellant's possession when apprehended was not large, nor was he shown to have been impecunious prior thereto.

There are important and compelling reasons for surrounding the inference with the safeguard of certain identification. Proving facts giving rise to the inference has drastic ramifications: standing alone, as charged in the instant case, it is sufficient proof of guilt; it has the effect of shifting the burden of explanation to the defendant in drastic derogation of the normal rules of burden of proof in a criminal case; it requires the defendant to take the stand and explain the innocence of his possession, thereby exposing his past criminal record to searching and invariably damaging examination.*

b) The charge that the jury could infer guilt solely from the fact that appellant had three dollars and ninety-two cents when he was arrested is "plain error" affecting substantial rights.

This Court may notice plain error affecting substantial rights even though not called to the attention of the

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* In the instant case appellant was asked about a prior conviction for petit larceny. (Tr. 126).

court below. Rule 52 (b) F.R. Crim. P. Because of the described drastic ramifications of an inference sufficient in and of itself to support a verdict of guilt, and because of the "limited character" of the inference, Wright v. United States, supra, any improper invocation of the inference can arguably be plain error. In the instant case, however, the Court need not rule broadly; the facts of this case make the use of the inference particularly prejudicial.

The issue for the jury was, quite clearly, resolving the conflict in testimony between Mr. Talbert, the eye-witness, and the appellant. There is no testimony other than Talbert's which even hints at a connection between appellant and the crime: the complainant did not see her purse being snatched; the store detective knew only what Talbert told him; the purse was not found on appellant; appellant denied having committed the crime when asked by the store detective and the police; appellant has no prior criminal record as a pickpocket.

Talbert's testimony was questionable on several counts: the fact that it was dark when he saw appellant somewhat discredits his powers of observation; his testimony that he did not apprehend the thief immediately, or say anything to the complainant, but instead got on the bus and only then spoke up, and then got off the bus and walked back with the complainant, is perplexing; and his testimony

that appellant committed the crime knowing that Talbert was witnessing the entire act (Tr. 38) is somewhat incredible.

These are properly matters for the jury to consider in arriving at its verdict, but the obvious infirmity of the instruction given is that the jury may have believed that Talbert was mistaken in his identification and still have returned the same verdict, a verdict that could not have been sustained without Talbert's identification.

The improper instruction assumed added significance because of the repeated and emphatic references by the prosecutor and the judge to the similarity in amount being clear "proof" of appellant's guilt. In summing up to the jury, the prosecutor argued:

> And she indicated the amount of money she had in her wallet, three one-dollar bills and eighty-five or eighty-seven cents. . . .
>
> The store detective came. They searched him and found three one-dollar bills and eighty cents.
>
> THE COURT: Ninety-two cents.
>
> MR. BLACKWELL: I'm sorry Your Honor, Ninety-two cents in change.
>
> And she said that she lost three dollars and eighty-seven cents, which means that either she lost a nickel more than she said or the defendant had a nickel on him when he took the money.
>
> But I respectfully submit, ladies and gentlemen, that the mere fact that it wasn't the exact amount does not prove that things didn't happen as the testimony indicated.
>
> Now, when he was arrested this amount was taken off of him by the security officer there at Kann's. (Tr. 142-143, 144-145) (Emphasis added)

Following this summation the judge told the jury:

> Now, the proof is that when the defendant was apprehended by the witness Talbert and then the security officer who searched him he had on him three one-dollar bills and ninety-one cents in change. Miss Bechter testified that she had three one-dollar bills and eighty-five cents in change. . . . (Tr. 184)

There were other errors, both in the charge and in the trial, which are discussed as separate assignments of error. Standing alone, these errors are sufficiently prejudicial to require reversal; certainly the commission of these errors cumulates the prejudice of the improper instruction.

(With respect to point II, appellant desires the court to read the following pages of the Reporter's Transcript: 178-187 inclusive).

II. THE CHARGE TO THE JURY WAS DEFICIENT ON THE ISSUES OF IDENTIFICATION, AND ON THE DUTY TO ACQUIT IF THE GOVERNMENT FAILED TO PROVE EACH ELEMENT OF THE CRIME CHARGED. THESE DEFICIENCIES ARE PLAIN ERRORS AFFECTING SUBSTANTIAL RIGHTS.

The sole issue of fact for the jury to properly consider in this case was whether the eye-witness identification satisfied them of appellant's guilt beyond a reasonable doubt. There is no evidence other than Talbert's testimony to connect the appellant with the alleged crime. Yet, notwithstanding that the jury was a new jury sitting on its first case* (Tr. 141, 186), they were not instructed that if they had a reasonable doubt about the identification they were required to return a verdict of not guilty. In fact, the judge's charge does not contain a single word about the issue of identification or that it is an essential element of the government's case.

Such an instruction is mandatory in a case where identification is in issue. In McKenzie v. United States, 75 U.S. App. D.C. 270, 126 F.2d 533 (1942), this Court held that when "a careful search of the record shows that the conviction rests largely on [the complainant's identification] . . . the failure to say in plain words that if the circumstances of the identification were not convincing, they should acquit, was error."**(Emphasis added).

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* In Mundy v. United States, 85 U.S., App. D.C. 120, 176 F.2d 32 (1949), this court said that less specificity in the charge is necessary when a jury with a few weeks experience is sitting than is true with a new jury.

** The judge in McKenzie at least instructed the jury on the considerations to think about in evaluating the identification evidence. The charge in the instant case did not even refer to these considerations.

The similarities between the deficient charge in McKenzie and the charge in the instant case are striking. In the instant case the judge made no mention that identification was one of the elements of the government's case. He ignored the fact that appellant had entered a plea of not guilty, which required the Government to prove each essential element of its case, rather than to disprove appellant's alibi. Nowhere in his charge did he instruct the jury in precise terms that a "not guilty" verdict is necessary in the event of failure by the government to prove each of the elements of the crime beyond a reasonable doubt. He looked only to the defense's explanation of appellant's possession of money similar in amount to that stolen from the complainant, and ignored all the other evidence in the case.

The error of such a charge can best be described in the language of this Court in McKenzie.

> The fact is that appellant had not entered a special plea of alibi or rested his defense solely on that ground. His plea was 'not guilty' . . . By singling out the alibi and emphasizing it the court in effect directed the minds of the jury almost exclusively to that aspect of the case. They were told that if they believed appellant was at home when the rape was committed, they should find him not guilty, but nowhere else in the whole charge were they told that in any other circumstances they should also find such a verdict. . . . Passing upon a similar question in McAffee v. United States, 70 App. D.C. 142, 105 F.2d 21, we said on this subject, it should be orthodox practice somewhere in the instruction to tell the jury in precise terms that a 'not guilty' verdict is necessary in the event of failure by the government to prove each of the elements of the offense beyond a reasonable doubt. . . . That is the rule in the District of Columbia, and it should have been followed in the present

> case, and since it was not, we are required to reverse and remand the case for a new trial.

It was expressly held in both McKenzie and McAffee that instructing the jury in the "usual terms" about the presumption of innocence and the government's burden of proof is not sufficient. See also, Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942).

There are still more deficiencies in the charge. It is the universal rule that instructions to the jury must define the elements of the crime alleged, to the end that the jury may apply the facts to the law as charged in arriving at its verdict. The failure to so charge is "plain error." See e.g. Screws v. United States, 325 U.S. 91, 107 (1945); Kenion v. Gill, 81 U.S. App. D.C. 96, 155 F.2d 176 (1946); McDonald v. United States, 109 U.S. App. D.C. 98, 284 F.2d 232 (1960); Morris v. United States, 156 F.2d 525 (9th Cir. 1946); Lott v. United States, 218 F.2d 675, 681 (5th Cir. 1955). In the instant case the court did not define any of the elements of the crime. The only part of the charge that alludes to the substantive elements of robbery is the brief passage on page 183-184 of the Reporter's Transcript:

> The charge here, as I have told you, is the charge of robbery, which charges that the defendant took from the purse of the complaining witness, Miss Bechter, a sum of money which was in that purse namely, $3.85 in money, by stealthy seizure and snatching.
>
> That is what we colloquially call the crime of pickpocketing.

In Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942), this court said "The average man has

some idea of what murder is, but we would not expect the judge to say, Jurors, you know what murder is, go and decide if this man is guilty of it." Yet in the instant case the instructions to the jury amounted to no more than this, substituting the word "pickpocketing" for "murder".

As a corollary of the rule that the judge must instruct on all elements of the case, it is also held that a criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence. See e.g. Womack v. United States, _____ U.S. App. D.C. ____, F.2d ____(No. 18,426, July 23, 1964); Tatum v. United States. 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (1951); United States v. O'Connor, 237 F.2d 466, 474 (2d Cir. 1956). In the case at bar the defense sought to prove that the defendant was not at the bus stop at the time of the robbery, and there was a clear foundation in the evidence for such a finding. The trial judge never mentioned this evidence, never mentioned the defense of alibi, and never instructed that if this evidence caused a reasonable doubt in the juror's minds they were required to acquit. These omissions compel reversal. See United States v. Barrasso, 267 F.2d 908 (3rd Cir. 1959); Isaac v. United States, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960); United States v. Marcus, 166 F.2d 497, 503-04 (3rd Cir. 1948).

(In connection with point III, the appellant desires the court to read the following pages of the Reporter's Transcript: Tr. 41-42, 171).

III. THE ADMISSION INTO EVIDENCE OF IMPROPER OPINION AND CONCLUSION EVIDENCE REQUIRES REVERSAL OF APPELLANT'S CONVICTION.

During the direct examination of the eye-witness concerning his actions after seeing the appellant in Kann's Department Store, the following occurred:

THE COURT: Did you recognize him?

THE WITNESS: Yes, sir.

THE COURT: What happened then?

THE WITNESS: Then he turned.

THE COURT: Did he see you?

THE WITNESS: Evidently he did, because when he saw me . . .

MRS. DWYER: I object to that as a conclusion, Your Honor.

THE COURT: Based upon what you observed, did you have the impression that he saw you?

THE WITNESS: Yes, sir.

THE COURT: Could he have seen you?

THE WITNESS: Yes, sir.

THE COURT: What did he do?

THE WITNESS: Well, he ran. (Tr. 41-42).

The underlined portions of this dialogue are inadmissible opinion evidence. The well-settled rule is that "testimony which is mere conjecture should be excluded." Am. Jur., Evidence,

Section 768. See also, Robertson v. United States, 84 U.S. App. D.C. 185, 171 F.2d 345 (1948); Brown v. United States, 80 U.S. App. D.C. 270, 152 F.2d 138 (1945).

This testimony became very significant when, in summation, the prosecutor stated:

> As soon as [appellant] sees [the eye-witness] he runs into the store. 'The guilty fleeth when no man pursueth.'* That is a Biblical statement. Why would this man flee? He recognized the man coming back and the complaining witness in this case. Oh, yes, the defendant recognized him! (Tr. 171).

Wholly apart from the fact that the quoted Biblical statement has been judicially discredited, see e.g. Hickory v. United States, 160 U.S. 408, 420 (1896); Alberty v. United States, 162 U.S. 499, 511 (1896); Miller v. United States, ____ U.S. App. D.C. ____, 320 F.2d 767, 770-773 (1963), and a court who had quoted this statement was reversed for it on grounds of "plain error", United States v. McCarthy, 301 F.2d 796 (3d Cir. 1962), there is no competent evidence that the appellant saw the eye-witness. Of course, from a description of the location of the principles and the opportunities for observation, the jury could properly infer that appellant saw the eye-witness, but the unwarranted speculation of the witness improperly weighted the ~~juries~~ jury's deliberation; and this is particularly so because the answers were in response to questions from the bench rather than from the prosecutor. Futhermore, the jury was not given the facts upon which to base such an inference although these facts could easily have been described.

* The quote is wrong. Biblical authority holds that "the wicked fleeth when no man pursueth." Proverbs. Chap. 28 Verse 1. Or, the prosecutor may have been thinking of Leviticus, Chap. 26, Verse 17: "And ye shall flee when none pursueth you."

(With respect to Point IV, the appellant requests the court to read the following pages of the Reporter's Transcript: 92-95, 172, 173-175)

IV. THE TRIAL COURT COMMITTED SUBSTANTIAL ERROR WHEN THE PROSECUTOR WAS ALLOWED TO BRING OUT, IN CROSS-EXAMINATION OF WITNESS ANDERSON, THAT ANDERSON WAS IN JAIL AT THE TIME OF THE TRIAL, ALBEIT HE WAS NOT CONVICTED OF ANY CRIME AT THAT TIME.

During the cross-examination of the only defense witness other than the accused, the following occurred:

Q You are a brick mason?

A Yes, sir.

Q Are you working at that trade now?

A Yes, I am.

Q Where did you work yesterday?

MRS. DWYER: I object, Your Honor,--

THE WITNESS: Where did I work --

MRS. DWYER: Just a minute, Mr. Anderson. May we come to the bench, Your Honor?

THE COURT: Yes.

(AT THE BENCH)

MRS. DWYER: May it please the Court, Mr. Anderson is in custody on a charge that has been alleged but not proven. Mr. Blackwell could not bring this out if he were on bond. I suggest that he is trying to get in the back door.

THE COURT: The Supreme Court says that you can ask him where he lives. He is now a witness.

* * *

MR. BLACKWELL: I am not asking him about a crime. I want to know whether he has talked to the defendant.

MRS. DWYER: I will stipulate that we discussed it yesterday in the cell block.

MRS. BLACKWELL: I want to find out when and where he talked to him.

THE COURT: You can ask him.

MRS. DWYER: I will object to his asking where he lives. I have no objection to your asking whether he talked to the defendant.

THE COURT: He has a right to find out whether the two of them have been talking together in jail. He has a right to ask that.

MR. BLACKWELL: I am not asking about a charge against him, Your Honor.

MRS. DWYER: It is patently obvious if he is in jail, he has either been charged or convicted.

MR. BLACKWELL: It is obvious since he came out of the cell block door that he is in custody.

THE COURT: He certainly has the right to ask if this witness and the defendant have talked to each other.

MRS. DWYER: They have.

THE COURT: Sure, and he has a right to show that it was in jail.

MRS. DWYER: I had both of them together myself yesterday. There is no doubt about it.

THE COURT: I overrule your objection.

MRS. DWYER: Your Honor, my objection is based, not on bringing out that they talked together, because, as I say, I will stipulate that, but my objection goes purely to the bringing out that he is in jail when, as a matter of fact, he has not been convicted of anything.

THE COURT: Yes.

MRS. DWYER: I wanted to be sure that the basis of my objection was recorded.

THE COURT: All right.

(END OF BENCH CONFERENCE.)

BY MR. BLACKWELL:

Q Have you talked to the defendant about this case recently?

A Yes.

Q When was the last time you talked to him about this case?

A Yesterday.

Q Where?

A Downstairs.

Q Pardon me?

A Downstairs in the cell block.

Q And you talked to him yesterday downstairs in the cell block?

A Yes, I did.

In the District of Columbia as well as elsewhere the rule is well settled that it is improper to question a witness, whether the accused or not, about arrests or imprisonments which have not already resulted in convictions. D.C. Code 14-305 (1961 Ed.); Sanford v. United States, 69 App. D.C. 44, 98 F.2d 325 (1938); Beasley v. United States, 94 U.S. App. D.C. 406, 218 F.2d 366, 368 (1954).* The reason has been given by the Supreme Court:

> Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

* In fact, even convictions are not proper subjects of inquiry when an appeal from the conviction is pending. Fenwick v. United States, 120 U.S. App. D.C. 212, 252 F.2d 124 (1958); Campbell v. United States, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949).

Michelson v. United States, 335 U.S. 469, 482 (1948) (dicta)

In the instant case the court allowed the prosecutor to do indirectly what he could not have done directly. Although the fact that appellant and Anderson had talked together about the case is a proper subject for cross-examination, there was no need to show that Anderson was in jail at the time. Properly phrased questions, or acceptance of the offered stipulation, would have easily demonstrated the opportunity for conversation without contaminating the testimony with the improper fact of Anderson's incarceration.

Significantly, the prosecutor did not let the jury forget that Anderson was in jail. He referred to it in his summation by pointing out that Anderson had come to the courtroom from the cell block (Tr. 172) and then, over objection, engaged in the wildest speculation, totally unsupported by any evidence, that Anderson was the "mastermind" the "general," who plotted the robbery. (Tr. 174-175).

This Court has recognized the likelihood that jurors will draw improper inferences from irrelevant evidence of involvement with the law, and has stated that prejudice may be presumed. Drew v. United States, ____U.S. App. D.C. ____, 331 F.2d 85, 89-90 (1964). In the instant case the prejudice need not be presumed; it is manifest. Because there were no other witnesses in appellant's behalf, Anderson's testimony was not merely cumulative, it was vital to the defense. His testimony, if believed, placed appellant in Kann's on proper business, explained the money in appellant's possession, and virtually negated any chance that appellant was the purse snatcher.

APPENDIX

The following 64 cases all involved the inference of guilt arising from the recent unexplained possession of stolen property. They all illustrate that the inference has no application where the property is not specifically identifiable.

Trucks & Cars

McKnight v. United States, _____ U.S. App. D.C._____, 309 F.2d 660 (1962); Bray v. United States, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962); Battaglia v. United States 205 F.2d 824 (4th Cir. 1953); Tractenberg v. United States, 53, App. D.C. 396, 293 Fed. 476 (1923); Epps v. United States, 81 U.S.App. D.C. 244, 157 F.2d 11 (1946); Gilbert v. United States, 94 U.S. App. D.C. 321, 215 F.2d 334 (1954); Manning v. United States, 215 F.2d 945 (10th Cir. 1954); Schwachter v. United States, 237 F.2d 640 (6th Cir. 1956); Prince v. United States 217 F.2d 838 (6th Cir. 1954); Barfield v. United States, 229 F.2d 936 (5th Cir. 1956); Morandy v. United States, 170 F.2d 5 (9th Cir. 1948), cert. denied, 336 U.S. 938 (1949); Bruce v. United States, 73 F.2d 972 (8th Cir. 1934); Brubaker v. United States, 183 F.2d 894 (6th Cir. 1950); Seefeldt v. United States, 183 F.2d 713 (10th Cir. 1950); McNamara v. Henkel, 226 U.S. 520 (1913); United States v. Washington, 69 F. Supp. 143 (D. Mary. 1946); United States v. Di Carlo, 64 F.2d 15 (2d Cir. 1933); Drew v. United States, 27 F.2d 715 (2nd Cir. 1928); Wolf v. United States 36 F.2d 450 (7th Cir. 1929); Niederluecke v. United States, 47 F.2d 888 (8th Cir. 1931); United States v. Guido, 200 F.2d 105 (2d Cir. 1952); Levi v. United States, 71 F.2d 353 (5th Cir. 1934); Yielding v. United States, 173 F.2d 46 (5th Cir. 1949); United States v. Borda, 285 F.2d 405 (4th Cir.), cert. denied, 365 U.S. 844 (1961).

Securities, Bonds, Checks, Etc.

Bollenbach v. United States, 326 U.S. 607 (1946) (stolen bonds); Booth v. United States, 154 F.2d 73 (9th Cir. 1946) (stolen stock certificates); United States v. Seeman, 115 F.2d 371 (2d Cir. 1940) (stolen bonds); United States v. Segelman, 86 F. Supp. 114 (W.D. Pa. 1949) (Treasury bond); Murdock v. United States, 283 F.2d 585 (10th Cir.), cert. denied, 366 U.S. 953 (1960) (checks bearing a printed format of a night club); Weisman v. United States, 1 F.2d 696 (8th Cir. 1924) (property stolen from mail truck-stocks, bonds, etc.); Andrews v. United States, 157 F.2d 723 (5th Cir. 1946) (forged automobile tire certificates).

Bank Money

Crawley v. United States, 268 F.2d 808 (4th Cir. 1959); Self v. United States, 249 F.2d 32 (5th Cir. 1957); Petro v. United States, 210 F.2d 49 (6th Cir. 1954), cert. denied sub. nom., Sanzo v. United States, 347 U.S. 974, 347 U.S. 978; Gill v. United States, 285 F.2d 711 (5th Cir. 1961), cert. denied, 373 U.S. 944 (1963).

Interstate Shipment of Goods

United States v. De Sisto, 329 F.2d 929 (2d Cir.), cert. denied, 84 S. Ct. 1885 (1964) (imported silk goods); United States v. Lefkowitz, 284 F.2d 310 (2d Cir. 1960) (shoes and other merchandise); Real v. United States, 326 F.2d 441 (10th Cir. 1963) (china dishes); Janow v. United States, 141 F.2d 1017 (5th Cir. 1944) (cartons of cigarettes); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948) (bales of duck canvas); United States v. Strickland, 205 F. Supp. 299 (E.D. Mich. 1962) (steel); Pearson v. United States, 192 F.2d 681 (6th Cir. 1951) (whiskey); Rosen v. United States, 271 Fed. 651 (2d Cir. 1920) (40,000 lbs. of copper ingots); Degnan v. United States, 271 Fed. 291 (2d Cir. 1921) (shoes); Nakutin v. United States, 8 F.2d 491 (7th Cir. 1925) (hosiery--the shipment was "positively identified"); United States v. Danzo, 164 F.2d 200 (2d Cir. 1947) (a specifically numbered carton containing "goods" stolen from a pier in N.Y.); United States v. Werner, 160 F.2d 438 (2d Cir. 1947) (four cases of razor blades); Thomas v. United States, 11 F.2d 27 (4th Cir. 1926) (10 cases of cigarettes--"Upon examination the cigarettes were found to correspond with those which had been stolen from the freight car some months before. The cartons bore the mark 'G-242'...which mark was on the cartons which had been stolen.);United States v. McNeil, 255 F.2d 387 (2d Cir. 1958) (102 cases of rubber floor tile); Murphy v. United States, 133 F.2d 622 (6th Cir. 1943) (4 cases of stolen cigarettes--"The jury also evidently found that the cigarettes which appellants had in their possession were those stolen, and this finding is supported by convincing evidence.")

Stolen Property (misc)

Edwards v. United States 78 U.S. App. D.C. 226, 139 F.2d 365 cert. denied, 321 U.S. 769 (1944) (a gun, clothing, and penknife); Miller v. United States, _____U.S. App. D.C. _____, 320 F.2d 767 (1963) (a wallet that had been pickpocketed); Herman v. United States, 289 F.2d 362 (5th Cir.) cert. denied, 368 U.S. 897 (1961) (salesman's jewelry case containing various samples of rings and mountings); Corey v. United States, 305 F.2d 232 (9th Cir. 1962) (stolen jewelry); McAbee v. United States, 111 U.S. App. D.C. 74, 294 F.2d 703 cert. denied, 368 U.S. 961 (1961) (cigarette lighter with initials, jewelry and wearing apparel); Grover v. United States, 183 F.2d 650 (9th Cir. 1950) (stolen diamond ring--4.06 carats set in platinum); Wilson v. United States, 162 U.S. 613 (1896) (five horses and a colt, a wagon, gun, bedclothing, other property); United States v. Allegrucci, 258 F.2d 70 (3d Cir. 1958) (movie projector , still camaras,); Husten v. United States 95 F.2d 168 (8th Cir. 1938) (approx 500 articles of jewelry--rings with diamond, cameo and other settings--"The jewelry was positively identified as that stolen");

Stolen Property (misc)

United States v. Anderson, 45 F. Supp 943 (S.D. Calif. 1942) (896 lbs. of aluminum rivits); Torres v. United States, 270 F.2d 252 (9th Cir.), cert. denied, 362 U.S. 921 (1959) (stolen camara with serial numbers engraved on it--the court specifically noted in its holding that the goods were "identifiable by serial number"); Boehm v. United States, 271 Fed. 454 (2d Cir. 1921) (8 automobile rubber tires specifically identified by serial numbers on the tires); Shuman v. United States, 16 F.2d 457 (5th Cir. 1927) (10 brass hub propeller nuts); Balman v. United States, 94 F.2d 197 (8th Cir. 1938) (stolen furs).

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,937

CHARLES E. TATUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. In a robbery case, where the identified thief is found to have in his pocket $3.92 within minutes of the taking from his victim of "approximately" $3.85, is instruction proper that though the particular currency is not identifiable, a jury might find appellant had guilty possession of the money, which was a circumstance they then might consider together with the other evidence of appellant's guilt?

2. Where no contrary evidence appears, no cross-examination tests the facts of a robbery of the complainant, defense counsel predicates closing argument on the statement that no issue is taken with the fact the robbery occurred, and no instructions are sought by counsel before or after the charge, is it error for the Judge to give a general instruction defining the crime of robbery as it applies to the agreed facts of the case?

3. Did the Judge err in admitting testimony of the impression of a witness that appellant fled when he saw the witness approaching him, when it was shown appellant could have seen the witness and the impression was based on what the witness saw?

4. Was a defense witness prejudically shown to have been in jail when he was made to testify he talked with appellant "in the cell-block," where appellant was in jail at the time of trial, when it was obvious to the jury the witness had entered the courtroom through the cell-block door, and where it did not explicitly appear the witness was confined?

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* Cases chiefly replied upon are marked by asterisks.

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By this appeal, appellant resists incarceration under the Youth Correction Act, 18 U.S.C. 5010(b), which followed a jury's determination of his guilt of pickpocket robbery. 22 D.C.C. 2901. In his trial on March 5 through 9, 1964 for the offense of January 14, 1964, the jury rejected his denial of the theft.

The case for the prosecution presented a familiar pattern of the pickpocket's art. The complainant Bechter's purse was taken from her pocketbook as she boarded the bus at 8th and Pennsylvania Avenue, Northwest (Tr. 26-

30). The theft was observed by one Talbert, who testified he had observed appellant standing in the crowd waiting for the bus, and saw him move to Miss Bechter's side, removing the purse as she mounted the bus (Tr. 36-38, 45). Following her aboard, he told her of her loss as the bus moved off (Tr. 39, 46). Together they alerted the driver, who let them off a block away. They returned to 8th and Pennsylvania looking for the thief (Tr. 32, 40, 48). Talbert saw appellant looking out a window of Kann's department store. Though appellant fled at his approach, Talbert overtook him trying to leave through a 7th Street store exit; Talbert seized and held appellant, calling for aid as he did so[1] (Tr. 32-33, 35, 40-42, 52-59, 135-137).

Store detective MacLuskie came upon the pair "fighting." Talbert had achieved a full nelson on appellant whereby appellant was bent over a sales counter (Tr. 67-69, 74). The special policeman took both men into custody; Talbert told how appellant had robbed a lady; appellant denied knowledge of what Talbert was talking about; Miss Bechter resolved the matter when she appeared to tell MacLuskie appellant had taken her purse (Tr. 70-71, 74-75, 128). Appellant told MacLuskie his name was Charles Tate (Tr. 70-71).

When asked how much money she had lost—both in the store and on the stand—she replied "approximately $3.85" (Tr. 29, 129). MacLuskie produced from appellant's pocket 3 dollar bills and 92 cents (Tr. 72, 129). At his inquiry to appellant "is this it?", appellant had replied "Yes" (Tr. 129, 132). Before leaving the store, appellant told Talbert, "I'm not going to forget you, and I have some friends who won't forget you either" (Tr.

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[1] Just after appellant had taken the purse, Talbert told him he was a rat, to which appellant simply replied, "Aw, man" (Tr. 38-39). In the store, Talbert repeated his view that appellant was a rat in charging him with the theft. Appellant replied, "I'm one of your own." Talbert then told appellant, "Well, I don't care if you're colored or white, if you're wrong, you're wrong" (Tr. 58-59).

131). Officer Baytop rounded out the Government's case with his testimony that he found the purse identified as Miss Bechter's in the bushes immediately adjacent to the bus stop (Tr. 76-77).

Appellant defended with denial that he took the purse, calling his companion [2] of the afternoon in support of his case (Tr. 108, 115-116). He was in Kann's all right, with the friend he left at the lunch counter at about the time in question; en route to purchase a sweater, he was seized from the rear and choked until he blacked out (Tr. 103, 105-107, 114-115). On the stand, he recalled his impression that his assailant—whoever it was—was going into his pocket (Tr. 106-107, 116-117). Upon regaining his senses, appellant was accosted with the robbery as his handiwork (Tr. 107). He saw the detective remove the money from his pocket, though he was not told the amount taken (Tr. 117-119, 125-126). He testified the lady had not been sure of the amount of change she missed (Tr. 125). Appellant stated he asked repeatedly for the return of a 20 dollar bill which was in his possession all afternoon (Tr. 118-121). He accounted for the money in his pocket by explanation that he had a 20 dollar bill and 2 one dollar bills up until the time earlier in the afternoon when his friend had discharged an indebtedness of $2.00 by payment of a one dollar bill and one dollar in change (Tr. 103-105, 107, 112). The government's rebuttal evidence denied any mention by appellant of a 20 dollar bill (Tr. 127, 129, 133-135).

Argument to the jury framed the issue as one of credibility of the witnesses. Government counsel urged acceptance of the Government witnesses' version of the robbery, urging there could be no alternative to a guilty verdict (Tr. 141-150). Defense counsel, prefacing her remarks with commentary directed to the nature of the credibility

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[2] Anderson's testimony was designed to show that the pair was on a shopping trip, that appellant had disappeared in Kann's in search of a sweater, and that he had seen appellant's 20 dollar bill earlier that afternoon (Tr. 82-87, 90-91).

issues, introduced her discussions of the evidence with the assertion (Tr. 150-153):

> But, ladies and gentlemen, I would like to point out to you a few things which Mr. Blackwell did not.
>
> First of all, we have no quarrel with Miss Bechter's testimony. I have no doubt whatsoever that she was robbed of Government's Exhibit No. 1 (Indicating the exhibit.) at precisely the time, place and under the circumstances she said she was.
>
> I have no doubt that Mr. Talbert witnessed the robbery.

She first urged that the government's witnesses were mistaken and then suggested that Talbert was an incredible witness, while reconfirming that Miss Bechter had indeed been "the victim this time" (Tr. 153-164). Government counsel in rebuttal argument accepted this narrowing of the dispute, emphasizing—without objection—defense counsel's acceptance that there was "no doubt but that Mr. Talbert witnessed a robbery, and . . . no doubt that Miss Bechter lost her pocketbook" (Tr. 168).

Neither counsel submitted proposed instructions. The judge's charge included instructions on credibility of witnesses, presumption of innocence, and reasonable doubt. He advised the jury that while specific currency could not be identified with particularity, the similar sum recovered from appellant as had been taken from the complainant might be found by the jury to be "guilty possession," and if the jury chose so to find, this possession could be considered by them together with all the other circumstances of the case (Tr. 178-186). Ending the charge, the Judge asked if counsel wished to add to the charge as given, to which defense counsel replied only, "I think not, Your Honor" (Tr. 186).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

Instruction that the jury might properly consider with all the other evidence in the case the amount of money recovered from appellant upon his arrest was not improper. The jury was told they might do so only if they did not credit appellant's explanation of that particular amount of money. Given the brief time between robbery and arrest, and testimony that the amount stolen was "approximately $3.85," the inference clearly was allowable

Having sought tactical advantage by suggesting no disagreement with the facts of the crime, but rather affirmatively agreeing that the facts had occurred, and that they constituted robbery, appellant cannot now find fault with the trial court's instructions which instructed only generally on robbery. The jury was given to know they might acquit if the charge had not been proved beyond a reasonable doubt; in no way did this asserted deficiency affect the only issue in the case, which was whether or not appellant was the thief.

No meritorious complaint lies against allowance of Talbert's "impression" that appellant fled when he saw Talbert approach Kann's store. It was made clear appellant was in a position to see Talbert, and that Talbert's impression was generated by the facts of appellant's sighting and immediate retirement back into the store. The

testimony was admissible, subject thereafter to cross-examination. Similarly, the notion that defense witness Anderson was erroneously shown to be "in jail" is fanciful. That he had talked with appellant in the cell-block gave not the fact away. No more than his entry through the cell-block door to the courtroom itself did an obscure remark in the prosecutor's closing argument suggest Anderson the perpetrator of a crime, and for that reason unworthy of belief.

ARGUMENT

I. Plain error affecting substantial rights cannot be shown on the record of the instant case to have resulted from the charge to the jury.

(See Tr. 26-30, 32-33, 35, 36-39, 40-42, 45-46, 48, 52-59, 67-69, 70-72, 74-77, 103-108, 114-118, 121, 125-126, 128-129, 131-137, 141, 164, 168, 178-186)

Appellant brings to this Court several suggestions of error which come unrecommended by his retained experienced trial counsel below. It is now urged that there were omissions from the charge which seriously affected the jury's deliberations of basic issues, yet no proffers were tendered the trial court prior to the charge.[3] It is pro-

[3] The evidence was scanty on which alibi and identification instructions might have been predicated if they had been requested. The "alibi" was predicated on appellant's presence in the store a half-block away when the robbery occurred. Precise times were adduced by neither side. Appellant was out of his companion's presence at about the time in question so that he relied on his denial he went to the bus stop rather than that he could not have possibly been there. Such an "alibi" is no alibi at all. *Gregg* v. *State*, 69 Okl. Cr. 103, 101 P.2d 289, 296 (1940). As to identification, little evidence showed any circumstances which might have hindered identification. To the contrary—Talbot observed and spoke with appellant at the stop, again seeing him in a matter of a few minutes, when he apprehended him without hesitation. Particularly in view of counsels' arguments which presented the issues very sharply, it cannot be said the jury was confused as to what they must decide. *Jones* v. *United States*, 113 U.S. App. D.C. 233, 235 n.2, 307 F.2d 190, 192 n.2 (1962); *Obery* v. *United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), *cert. denied*, 349 U.S. 923 (1955).

tested that part of the charge should not have been given, yet at the end of the charge, when specifically asked by the court if there was anything else counsel wished instructed, appellant's counsel replied "I think not, your honor"[4] (Tr. 186). There is no claim of ineffective assistance of counsel. Indeed there could not be, for the record clearly shows that the charge was accurate and fair in its framing of the issues litigated in the context of the instant trial. *Graham* v. *United States*, 88 U.S. App. D.C. 129, 187 F.2d 87 (1950), *cert. denied*, 341 U.S. 920 (1951). No requests having been made for instruction, and no dissatisfaction evinced, the errors now asserted, since they did not affect substantial rights, are not properly before this Court for review. *Jones* v. *United States*, *supra*, *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

a. *Instruction on stolen property*

Appellant freely owns that appellant's possession of coin in similar amount to that of which the complainant was robbed was a circumstance of guilt properly considered by the jury (Br. 6). He urges, however, that the charge permitted the jury to find appellant's guilt from this fact alone, and that this was error (Br. 11, 13). The short answer to this proposition is that the charge allowed no such thing: the jury was told that if they did accept an inference from recent possession of stolen property, they might "take that circumstance into account *along with all the rest of the evidence* that there is so that your verdict will be upon the whole case . . ." (Tr. 186, emphasis supplied).

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[4] This is an ambiguous statement, to the extent it could either mean counsel was satisfied the charge properly presented the issues to the jury, or counsel did not wish to have the trial record free from errors which might warrant reversal if the jury failed to acquit. Since the jury had apparently found some amusement in the story of one defense witness, it is not unreasonable that counsel would feel another trial would be wise (Tr. 167, 173).

Appellant's "'all fours'" cases treat the inference allowable from proof of accused bank robbers' sudden affluence contemporaneous with the bank loss as a circumstantial factor allowable to prove guilt. They are simply inapposite here (Br. 9). The trial court properly warned the jury that the "actual" money was not specifically identifiable (Tr. 184). Elaborating that the circumstance they might properly consider was the similarity of the amounts of money, the judge accurately instructed they might find appellant's possession of $3.92 "guilty possession . . . or not" as they saw fit from the evidence (Tr. 185). The alternatives based on that determination were then expounded to the jury: acceptance of appellant's explanation of the amount of money in his possession required acquittal,[5] while rejection of explanation and adoption of an inference of guilt then must be considered with all the other evidence (Tr. 184-185). It cannot be presumed the jury did not follow the instruction as given. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). This instruction was not erroneous, much less so prejudicial that it invokes F. R. Crim. P. 52(b).

b. *Instruction on robbery*

There was no suggestion at trial that the complainant Miss Bechter had not been robbed. No cross-examination was directed to such an issue; experienced defense counsel of appellant's own choice specifically and categorically rejected any doubt that Miss Bechter had been "robbed" exactly as she had testified, and that Talbert had witnessed the "robbery" (Tr. 153). On this appeal, appellant again affirms that "The issue for the jury was, quite clearly, resolving the conflict in testimony between Mr. Talbert, the eyewitness, and the appellant" (Br. 12). The Judge accordingly instructed on presumption of inno-

[5] It is easy to see why defense counsel did not resist this instruction: it allowed appellant to earn acquittal simply if his explanation of the money in his possession was believed, in disregard of the other proof against him.

cence, stressing that appellant's guilt of the robbery must be proved beyond a reasonable doubt, stressing for the instant case—as had counsel's arguments—that the outcome depended on the jury's evaluation of the credibility of witnesses. Included in the instructions was a specification of the pickpocket robbery charged against appellant, that he "took from the purse of the complaining witness, Miss Bechter, a sum of money that was in that purse, namely, $3.85 in money, by stealthly seizure and snatching" (Tr. 183-184). This was, of course, exactly what Miss Bechter and Talbert had adduced in the testimony which was never put in issue, and which the defense specifically and categorically removed from jury doubt (Tr. 153). Appellant now charges that failure to instruct with more particularity on the elements of robbery must require reversal and retrial of the whole cause. Only if the omission charged was harmfully erroneous and worked to the serious prejudice of this appellant's rights can such a result follow. Cf. *Byrd* v. *United States*, No. 18,896, decided January 14, 1965.

It is hornbook that even in a jury trial, a defendant effectively may stipulate to certain facts and issues if he wishes. *United States* v. *Hefler*, 159 F.2d 831 (2d Cir.), *cert. denied*, 331 U.S. 867 (1947). It is also clear that where a factual issue is not contested and counsel argues that a particular issue is uncontested, the judge—relying on the defensive position—may comment with propriety that there is agreement as to that factual issue and tell the jury the elements of the crime predicated on those facts may be considered established. *Malone* v. *United States*, 238 F.2d 851 (6th Cir. 1956); see *Horning* v. *District of Columbia*, 254 U.S. 135 (1920); *Richardson* v. *United States*, No. 18,506, decided October 29, 1964; *United States* v. *Gollin*, 166 F.2d 123, 126, *cert. denied*, 333 U.S. 875 (1948); *Peters* v. *United States*, 113 U.S. App. D.C. 236, 307 F.2d 193 (1962). As this Court has stated in similar context, some such concessions of counsel are "highly commendable", such as those which are made

for defensive advantage. *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951); *Richardson* v. *United States*, *supra*. Of course, where defense counsel has resisted removal of such issues, *i.e.*, where agreement is vitiated by contrary evidence, argument or the seeking of instructions on the issue below, it may be error to limit jury consideration. *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395, 408-410 (1947); *Byrd* v. *United States*, *supra*; *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962); *Roe* v. *United States*, 287 F.2d 435 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961); *United States* v. *Gollin*, *supra*; compare *Roe* v. *United States*, *supra* at 442, with *Morissette* v. *United States*, 342 U.S. 246 (1952). But it is not for an appellate court to repudiate a course of action adopted by defense trial counsel, where that course invites what later is claimed error. *Riddick* v. *United States*, 117 U.S. App. D.C. 107, 326 F.2d 650 (1963); *Crawford* v. *United States*, 91 U.S. App. D.C. 234, 198 F.2d 976 (1952).

In the instant case, the judge instructed the jury they must acquit if they found the government had not proved appellant guilty of robbery beyond a reasonable doubt (Tr. 178-179). The question then is whether his definition in terms of the language of the indictment adequately informed "to the extent necessary to allow the jury to apply the law to the facts." *Kenion* v. *Gill*, 81 U.S. App. D.C. 96, 155 F.2d 176 (1946). Where there is defense encouragement to the jury to accept a set of facts and a legal conclusion, it can hardly be said either that the issue is fundamental to the case, or that the jury was confused to appellant's detriment by the court's acceptance thereof. *Jones* v. *United States*, *supra*.

Even if the action of the court were seen to be that of taking the issue entirely away from the jury, any error would be harmless, as the foregoing authorities demonstrate. For unlike *Byrd*, where this Court found no inferable concession from an "argumentative position" of

counsel,[6] the record here reveals affirmative, explicit agreement that the crime had been committed, and that it was robbery, the exact and only crime charged (Tr. 153). Handling of cross examination and acquiescence in the court's instructions leave no other conclusion than positive agreement. See *Richardson* v. *United States*, *supra*; *United States* v. *Gollin*, *supra* at 126. There is no showing that there was an issue latent in the proof overlooked by counsel. Compare *Byrd* v. *United States*, *supra*, citing *Morissette* v. *United States*, *supra* at n.5; *Tatum* v. *United States*, *supra*. The result sought by this course, in the face of a strong government case, was obviously to keep the jury from dwelling on the crime itself, and to sharpen their focus on the single issue upon which acquittal might be won. It was an attempt to enlist the aura of candor and probability for the defense. That it did not succeed hardly faults the attempt. *Riddick* v. *United States*, *supra*.

District Court reliance on the defense position, particularly in the circumstances of the instant case, cannot be classed as a fundamental error,[7] and certainly was not prejudicial to appellant's rights. For to have instructed more fully on the conceded robbery could not have changed the verdict: there is not a "reasonable possibility that the [error] . . . complained of might have contributed to the

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[6] The opinion in *Byrd* makes it clear that "concession" there was only inferable, noting that defense counsel commented the facts showed "a crime" had been committed, while at one point asserting the government did have to prove all the elements of the crime. Slip opinion, *supra*, 3-4. Further, Byrd's counsel's failure to seek or correct the instructions could not have been considered as affirmative agreement, in view of his earlier failure—held clearly erroneous—to seek instructions in a situation governed by *Bartley* v. *United States*, 115 U.S. App. D.C. 316, 319 F.2d 717 (1963). The Court's citation to *Clark* v. *United States*, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958) makes this quite clear.

[7] This argument does not overlook the unquestioned sanctity of a defendant's right to jury trial. The question of this right *in gross* is simply not the question of whether certain uncontested issues, those issues on which determination of guilt does not depend, may not properly be forgone for tactical advantage.

conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86 (1963). To argue the contrary on the facts of the instant case is to insist on ritualistic formality.

II. The court's rulings on evidence were not erroneous.

(Tr. 41-42, 45, 93-95)

Appellant's complaints of the trial court's erroneous admission of "opinion" testimony, and admission of evidence that defense witness Anderson was in jail at the time of trial are without merit. It was shown that Talbert's *impression* appellant saw him coming toward the store and fled was based on what he had observed as he approached (Tr. 41-42, Br. 19). Whether one individual reacts because he sees and recognizes another is an objective phenomenon to the other; it is perceived fact, not opinion, as defense counsel acknowledged later in cross-examination when she asked Talbert if appellant had seen him as they stood at the bus stop (Tr. 45). By no stretch can it be termed abuse of discretion to have allowed Talbert so to testify: when the impression was shown to have been based on fact, those facts were equally available on cross-examination. *Zimberg* v. *United States*, 142 F.2d 132, 135 (4th Cir.), *cert. denied*, 323 U.S. 712 (1944); *Central R. Co.* v. *Monahan*, 11 F.2d 212 (2d Cir. 1926).

Cross-examination of Anderson revealing that he had talked with appellant in the cell block the day before was hardly erroneous as showing Anderson was in jail since it did not so show. Anyone who talked with appellant the day before would have had to do so in the cell block, including his counsel (Tr. 93-95). It never developed explicitly that Anderson was incarcerated. The prosecutor's fleeting remark in closing argument that Anderson came out the same door as appellant was at best oblique reference to the circumstance (Tr. 172). It provided nothing the jury had not already seen; no mistrial was sought; it was not objected to at the time of its occurrence. If heard, and if heard, noticed, it was harmless. *O'Malley* v.

United States, 227 F.2d 332, 336 (1st Cir. 1955), *cert. denied*, 350 U.S. 966 (1956).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 762845 578

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 18,937

CHARLES E. TATUM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of United States District Court for the District of Columbia

RICHARD SHLAKMAN

Counsel for Appellant
(Appointed by this Court)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

I N D E X

TABLE OF CASES

STATUTES AND RULES

MISCELLANEOUS

* Authorities chiefly relied upon are marked by asterisks.

I. REPLYING TO THE COUNTERSTATEMENT OF FACTS

Before discussing the Government's arguments, two statements about the record require reply. The Government's counterstatement sets out a series of small quotations from the transcript which imply that the appellant admitted to the store detective his commission of the crime. Specifically the Government's brief says (at page 2):

> "When asked how much money she had lost ... she replied 'approximately $3.85.' MacLuskie produced from appellant's pocket 3 dollar bills and 92 cents. At his inquiry to appellant 'is this it?', appellant had replied 'Yes' (Tr. 129, 132)."

This distorts the record. The actual testimony at Tr. 132 is as follows:

> "BY MRS. DWYER [to the store detective]
>
> Q. When you took the money out of the pocket and put the question 'Is this the money?' or 'is this it?' -- whichever it was -- were you talking to the defendant or were you talking to Miss Bechter?
>
> A. I was talking to the defendant. He said he had some money. I took it out. I said, 'Is this it?' And he said yes."

Obviously, appellant was replying "yes" to the store detective's question "Is this it?" with regard to the money that appellant said he had. There is not the slightest suggestion in the record that appellant was admitting that he had the complainant's money.

The Government's counterstatement also gives the impression that the complainant identified the appellant as the thief. Their brief says "Miss Bechter resolved the

matter when she appeared to tell [the store detective] appellant had taken her purse."* It is perfectly clear that Miss Bechter did not know that her purse was stolen by anyone until she was so informed on the bus. Her statement was not an identification as the Government's brief suggests; rather, she was merely repeating what she had been told.**

II. THE INSTRUCTION ON STOLEN PROPERTY

The Government's brief quotes but a small part of the trial judge's charge, and from these snippets concludes that the charge was proper. Omitted from their brief is the entire first paragraph of the charge on this point, which instructs the jury that it may apply to this case the inference of guilt from unexplained recent possession of stolen property and that this inference is "prima facie evidence of guilt ... [which] may be of controlling weight unless explained by the circumstances or satisfactorily accounted for in some way consistent with innocence."***

The inappropriateness of this rule of law to the instant case was demonstrated in appellant's main brief. The Government does not cite a single case in which the inference was charged in a similar case, because in the

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* Appellee's Brief, p.2

** See Appellant's Brief, pp.2-3.

*** Tr. 184.

reported federal decisions there are none. The many cases in which the rule may apply, and has been applied, are collected and categorized in the main brief. The common feature of all the cases -- in fact the sine qua non of the cases -- is the certainty that the property found in a defendant's possession was the stolen property.*

III. TESTIMONY ABOUT THE SIMILARITY IN AMOUNT OF MONEY TAKEN FROM THE COMPLAINANT AND THAT TAKEN FROM APPELLANT AND THE MONEY ITSELF SHOULD NOT HAVE BEEN ACCEPTED AT TRIAL

The Government claims that appellant's main brief "freely owns that appellant's possession of coin in similar amount to that of which the complainant was robbed was a circumstance of guilt properly considered by the jury."** Appellant does not concede that this testimony was properly before the jury. In Karn v. United States, 158 F.2d 568 (9th Cir. 1946), the court held that evidence

* The Government contends that the "all fours" cases cited by appellant at pages 9-11 of the main brief are not in point because they "treat the inference allowable from proof of accused bank robbers' sudden affluence contemporaneous with the bank loss". Firstly, in one of the cited cases, Karn v. United States, 158 F.2d 568 (9th Cir. 1946), no bank robbery was involved. More importantly, however, the quotations and discussion at pages 9-10 of our main brief clearly show that the issue before the courts in Karn, Crawley, Self and Gill, infra p.4, was what inference to permit from the fact that the respective defendants had in their possession money that was either similar to -- not in amount but in appearance -- or specifically indentifiable by serial number as the money stolen. The cases are therefore directly in point.

** Appellee's Brief, p.7.

attempting to show that the money in the defendant's pocket was the same money that had been robbed from a bar the previous evening was inadmissable unless the prosecution proves beyond a reasonable doubt that the property found in the defendant's possession was in fact the specific money that was stolen. Assertions that the money looked like it or was similar in amount are wholly unavailing. In three other cases* the courts held that the fact that the defendants had some bills specifically identified by serial number as the bills stolen from a bank was not sufficient evidence to support an inference of guilt in the absence of an additional showing of newfound affluence. These cases clearly show the impermissability of allowing an inference of guilt from such a neutral fact as the possession by a defendant of several dollar bills and some change.

This rule is but one example of the general rule that "all evidence of facts should be excluded which are incapable of forming any reasonable presumption or inference as to the principal fact or matter in dispute";**

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* Crawley v. United States, 268 F.2d 808 (4th Cir. 1959); Gill v. United States, 285 F.2d 711 (1961); Self v. United States, 249 F.2d 32 (1957)

** Am. Jur., Evidence, Section 273

or, to state the rule in another form, evidence should be excluded if its legitimate probative value is so little as to be outweighed by the risk that its admission will cause undue prejudice. See, e.g., Uniform Rules of Evidence, Rule 45; McCormick, Evidence, Section 152 (1954) and the many cases cited therein. The fact that appellant, when arrested had in his possession a small amount of money which approximated in amount that stolen from the complainant, has sc little logical compulsion in proving the fact of theft that the testimony of his having the money, and the money itself, should have been ruled legally irrelevant.

Although an objection to the introduction of testimony about the money seized from appellant was made, trial counsel did not object on the grounds that the evidence was incompetent and irrelevant. Nevertheless, since both the prosecutor and the trial judge emphatically described the circumstance of similarity of amount as clear "proof" of appellant's guilt,* the error in admitting this evidence affected substantial rights, and this Court should notice the plain error. F.R. CRIM. P .52(b).

IV. THE INSTRUCTION ON ROBBERY

Since the filing of appellant's brief in this case, this Court has decided Byrd v. United States, No. 18,896 (January 14, 1965). Appellant submits that the Byrd case compels reversal of the instant case on the issue of the

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* See the quotations from the Transcript at pages 13-14 of the appellant's main brief.

adequacy of the charge. In our main brief we argued that the charge to the jury was deficient on the issues of identification, and on the duty to acquit if the Government failed to prove each element of the crime charged. It was pointed out that the judge's charge to the jury failed to discuss the elements of the crime of robbery, never mentioning that among the elements not specified in the statute was intent to commit the robbery. The trial judge merely read the indictment, which was framed in the words of the statute. Considering such a charge, this Court said in Byrd:

> "The charge to the jury contains neither a recitation nor a discussion of the elements of the offense for which the defendant was on trial. The only guidance given to the jury as to the nature of the offense, and the burden upon the Government to prove every essential element thereof, consisted of a reading of the robbery statute [footnote omitted]. This was not sufficient. The statute does not even set forth all the essential elements of the offense .... Since there are essential elements of common law robbery not stated in the statute, such as the specific intent to steal, [footnote omitted] mere reading of the statute was plainly inadequate. It was fundamental error to send the case to the jury without instructions as to the elements of the offense which the Government must prove beyond a reasonable doubt before a verdict of guilty can be returned."

In its brief in the instant case the Government says that Byrd is inapposite because the only issue litigated in the instant case was the question of appellant's identity.* The exact same contention was rejected in Byrd:

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* Appellee's Brief, pp.8-9

"While admitting that the instructions given failed to apprise the jury of the essential elements of the offense, the Government contends that no prejudicial error resulted in this case since defense counsel in his closing arguments 'agreed' there was no dispute over the fact that a crime had been committed [footnote omitted]. The only issue, according to the Government's theory, concerned the identity of the perpetrator.

"This argument fails to consider the fundamental nature of the defendant's right to have the question of his guilt determined solely by the jury. By pleading not guilty, the accused puts the Government to the burden of proving every element of the crime beyond a reasonable doubt. Strict procedural safeguards have been erected to insure that this privilege is not lightly waived. [Footnote omitted]. In view of these safeguards, it would be anomalous indeed if the defense counsel, by taking an argumentative position in his closing statement, could thus informally waive his client's right to have the jury pass on the essential elements of the crime."*

The Government further attempts to distinguish Byrd by saying that it is hornbook law that in a jury trial a defendant effectively may stipulate to certain facts and issues if he wishes, and further that it is clear that when a factual issue is not contested the judge may comment with propriety that there is agreement and take the issue from the jury. This contention again is answered by the Byrd opinion:

* The Government contends that the citation in the Byrd opinion to Clark v. United States, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958) (in which this Court reversed a conviction on the ground that trial counsel had erred in abandoning an insanity defense) shows that Byrd's counsel did not affirmatively agree to removing all issues except identification from the jury. I do not understand the point, but I do agree that Byrd's counsel did not agree, any more than did appellant's trial counsel, by taking an argumentative position in summation, to informally waive vital rights. If the right was waived in either case, it was reversible error to do so. See Clark v. United States, supra.

> "Finally, the Government contends that there was no reversible error since, on the evidence presented, the trial judge could have taken the uncontested issues from the jury. But the fact is that, in this case, the judge did not take any issues from the jury ....

Likewise in the instant case the fact is that the judge did not take any issues from the jury.

The Government also urges that absent objection the erroneous instruction was not error affecting substantial rights. Byrd again has the answer:

> 'We hold, therefore, that the trial judge's omission to instruct the jury on every essential element of the crime was plain error under Rule 52(b) FED. R. CRIM. P. By this omission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially affected [footnote omitted] and a new trial is required.'

Nothing cited by the appellee leads to a different conclusion here.* We do not argue that a defendant may not stipulate to certain facts; no stipulation was made here. Nor is it necessary to argue that the judge cannot take uncontested issues from the jury (a question left open by Byrd); the judge did not do so here. Nor do we contend that an appellant court should repudiate an evidentiary trial strategy affirmatively adopted by

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* Horning v. District of Columbia, 254 U.S. 135 (1920), the Supreme Court case chiefly relied on by appellee, was a five-to-four decision holding that where all the evidence is undisputed and the only issue is whether defendant's voluntary conduct violates a statute, the judge may in effect tell the jury that the defendant violated the statute. See United States v. Murdock, 290 U.S. 389. The most recent Supreme Court citation to Horning was in Gore v. United States, 357 U.S. 386, 389 (1958), where Justice Frankfurter cited the dissent in Horning to demonstrate that Justice Brandeis, Butler and Roberts who were among the dissenters were "conspicuous for their alertness in safeguarding the interests of defendants in criminal cases and in their insistence on the compassionate regard for such interests.'

defense counsel; that is not the question here.

The "plain errors" of omission in the instructions in the instant case go further than the Byrd defect of failing to define the elements of the crime; here there was also no charge on identification* or alibi.**

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* The Government has said that the only issue in this case was one of identification; that appellant's trial counsel had so framed the issue; that the Government accepted the issue as so narrowed; and that the trial judge appropriately charged only on that issue. (Appellee's Brief, pp.3-4) Yet, when appellant complains that the charge was completely deficient in that it did not acquaint the jury with the duty to acquit if the identification evidence itself was not convincing beyond a reasonable doubt (Appellant's Brief pp. 15-17), the Government says:

> "As to identification, little evidence showed any circumstances which might have hindered identification."
> (Appellee's Brief, p.6,n.3)

Quite the contrary, the eye-witness's capacity to identify the culprit was seriously in doubt: it was obviously dark when Talbert saw the culprit; he observed the robber for only a few moments; he did not apprehend appellant for at least 15 to 20 minutes after seeing the robbery. (While there are no estimates of the time in the record, this is the minimum amount of time it would take for the bus which Talbert boarded with Miss Bechter to travel up to 10th and Pennsylvania, for Talbert and Miss Bechter to alight and walk back in the snow, and for Talbert to locate appellant in Kann's and apprehend him.)

** The trial judge in Byrd did charge properly that if the defendant's alibi created a reasonable doubt of guilt, the jury was obligated to acquit. Byrd v. United States. Tr. 237.

V. THE COURT'S RULINGS ON THE EVIDENCE WERE ERRONEOUS

Little need be said in reply to the Government's point II. Appellee contends that both the questioning about and the reference in summation to witness Anderson's incarceration were harmless. As noted in appellant's main brief (at p. 24) this Court has held to the contrary, and said that from improper references to a witness's pre-conviction incarceration, prejudice may be presumed. Particularly is this so in the instant case where the witness improperly impeached was the only defense witness other than the appellant.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be reversed and a new trial ordered.

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